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Nos. 584, 588

In the Supreme Court of the United States

October Term, 1944

Western Electric Company, Incorporated,
petitioner

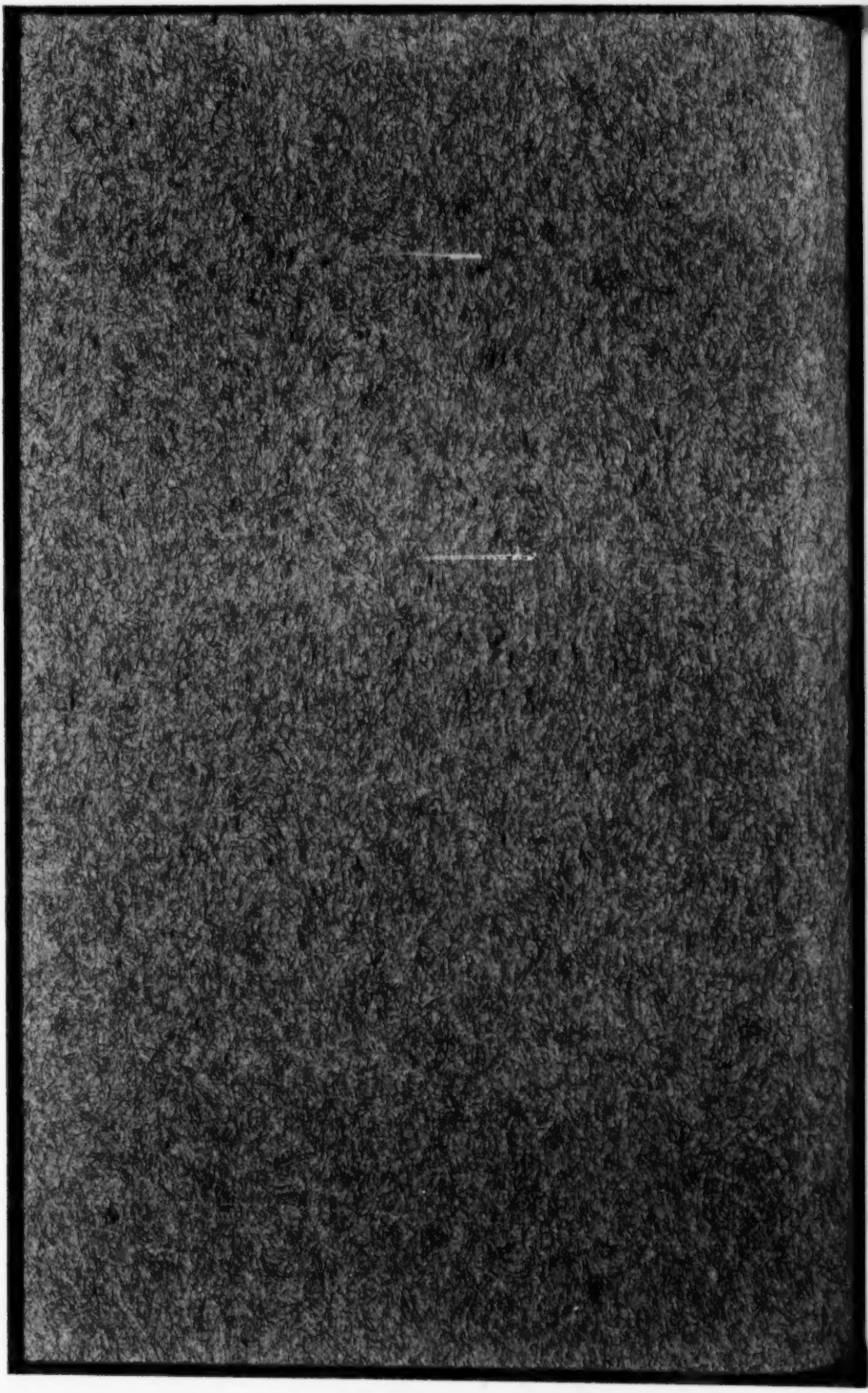
v.

National Labor Relations Board

Point Breeze Employees Association, Inc.,
[illegible]

[illegible]

[illegible]



INDEX

CITATIONS

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Nos. 984, 988

WESTERN ELECTRIC COMPANY, INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

POINT BREEZE EMPLOYEES ASSOCIATION, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinions of the court below (R. 323–346) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 64–99) are reported in 57 N. L. R. B., No. 178.

JURISDICTION

The decree of the court below (R. 347) was entered on January 3, 1945. The petitions for writs of certiorari were filed on February 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the National Labor Relations Board, sustained by the court below, that Western Electric Company, Incorporated, dominated, interfered with, and supported a labor organization of its employees (known as Point Breeze Employees' Association), and thereby and in other respects, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

2. Whether the court below erred, upon review of the Board's findings, in referring in its opinion to several items of evidence which support the findings but were not expressly relied upon by the Board in its decision.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 19.

STATEMENT

Upon the usual proceedings, the Board, on August 9, 1944, issued its findings of fact, conclusions of law, and order (R. 64–99). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[1]

In 1933, Western Electric Company, Incorporated (hereinafter called the Company), established a conventional Employee Representation Plan, hereinafter called the Plan, at its several plants (R. 72; 106–109, 112, 131–132, 231–239, 286–287). The Plan operated through three pyramided types of joint employee-management committees, none of which had more than advisory authority (R. 72–73; 231–232, 234–235, 242, 244–245). The employee representatives on the committees were elected by their fellow employees from "voting districts" established under the Plan and the management representatives were appointed by the Company's officials from the highest level of the supervisory staff (R. 72–73; 133–134, 232, 233, 239, 243). Membership in the Plan was limited to hourly rated workers and was automatic (R. 72; 117, 232–233, 239, 242). No dues were required, as the Company financed the

[1] In the following statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence. Occasional references to the original transcript of the record are designated "Tr."; all other references are to the printed record and are designated "R."

entire operation of the Plan (R. 73; 114–118, 133, 147, 231, 244). At the Company's Point Breeze, Maryland, Works, which is the only plant here involved, the Plan was maintained in operation and supported by the Company without material alteration until April 1937, when this Court sustained the constitutionality of the Act (R. 73; 110–118, 132–133, 231–246, Bd. Exh. 6.).

The Point Breeze Employees' Association (hereinafter called the Association) was formed in the period between April and June 1937 under the sponsorship of the 17 employee representatives under the Plan, for the avowed purpose of continuing the Plan system of conducting labor relations and of preventing any "outside" organization from coming into the plant (R. 75–82, 90–92; 120–125, 127–128, 154–155, 202, 203, 206–207, 211, 212, 218, 247–252, 254–257). These representatives also drafted its constitution and by-laws, the major portions of which are still in effect (R. 79, 91; 124–125, 130–131, 148–149, 256–257, Bd. Exh. 41, Intervenor's Exh. 14). The structure of the Association retained the essential features of the Plan (R. 81; compare R. 255–266 with R. 231–246), including the latter's division of the plant into "voting districts" (R. 81–82; 239, 261–264), its requirement that representatives must be employed in the voting district which they were to represent (R. 82, 92–93; 189–190, 259, 289), its restriction of eligibility to hourly rated workers (R. 75, 80; 117, 239, 258), and its

allocation to the general membership of a role limited almost exclusively to voting in the annual elections (R. 82, 92; 231–235, 242–245, 260–261, 266; see also R. 113, 134, 163, 177, 223, 226–227).

The formation of the Association was not preceded by any effective steps by the Company to free the employees from the confining effects of its domination of the Plan (R. 94). There was no explicit disavowal of the Plan to the employees or clear and unequivocal announcement to them that the Company would no longer deal with it and that it would thenceforth be indifferent to the employees' organizational efforts (R. 90). Instead, the Company's vice president, on April 16, 1937, merely informed the employee representatives under the Plan, but not the employees generally, that the Company could no longer bargain with that organization, and thereafter permitted the representatives to transmit this information second-hand to the general body of employees and to tell them that the Plan was "out" solely because it had been financed by the employer and that it was necessary to have a "new" and "self-supporting" Plan or to have no organization at all (R. 74–75, 90; 119, 122–123, 127–128, 130, 136, 148, 152, 154–155, 160–161, 175, 199–200, 206, 208, 211–212, 217, 218, 247–252).

Nor was there any break in time between the Plan and the Association, during which the employees might exercise a free choice as to representation; instead, complete continuity was main-

tained (R. 90–91). Thus, despite the Company's earlier declaration to the representatives that it would no longer "deal" with the Plan, it continued until April 22 to meet with the Plan representatives for the purpose of discussing, in the manner customary at such conferences, wages, hours, and conditions of work (R. 75, 90–91; 135, 201–202, 281–284, Bd. Exhs. 30, 31). On April 22 and 23, the 17 Plan representatives conducted at their own expense and "won" an election in which they ran themselves as the only candidates for membership on a committee to act as the employees' bargaining agency until the "new" Plan was formed (R. 76–79, 90–91; 121–122, 149, 248–252). The Company thereupon promptly recognized the continuing exclusive representative status of the 17 representatives during the subsequent period of 60 days while they formed the Association (R. 79, 91; 252–253, 256).

The 17 Plan representatives submitted the Association to the employee body for adoption at an election on June 12 and 14, 1937 (R. 79; 124–125, 128, 267–268). In the same balloting the employees applied for membership in the Association, authorized a check-off of dues, and selected representatives to serve on the Association's governing board (R. 79–81, 93; 125, 128, 267). The employees accepted the Association, and elected 13 of the 17 Plan representatives to continue on the board of 24 representatives under the Association (R. 81, 93–94; 128–129, 213, 217, 256, 268,

276).[2] The employees' acceptance of the Association, under the foregoing circumstances, was not their free and voluntary act (R. 94); restricted and conditioned over a long period of time to being represented by the dominated Plan, the employees, all of whom had been automatically members of that organization, "were moved as a mass" into the Association without ever being freed from the compulsive effects of the Company's domination of the predecessor organization (R. 93).

Shortly after the foregoing events, the Company granted the Association exclusive recognition (R. 83; 268–270), and subsequently afforded it still other support. Thus, the Company agreed to the initial major demands of the Association for a check-off system and for a general wage increase when its leaders warned that unless the concessions were granted the employees would not "want this kind of organization" and might affiliate with "other organizations" (R. 83–84; 137–138, 270–271, 273–275, Resp. Exh. 30). The Company's supervisory employees often permitted Association members to take time off to solicit members in the plant during the working day (R. 86–87; 151,

[2] Under the Association there were 24 representatives instead of 17 as under the Plan (R. 81–82; 256, 262–264). The first president of the Association was the last president of the Plan and chairman of the committee which drafted the successor's constitution and bylaws (R. 83, 92; 113, 130, 256).

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164–165, 171–172, 174–175, 180–183, 184, 190–192, 197–198, 226, 229–230. See also Tr. 507–513, 625), and to engage in widespread distribution of the Association's publication to employees at their places of work (R. 87; 163–167, 173–174, 183–186, 224–225, 228–229). In 1941 and 1942 the Company also allowed the Association to hold elections on company time and premises (R. 86; 155–156, 161–162, 169–170).

Moreover, when, in January or February 1943, the International Association of Machinists, herein called the I. A. M., began to obtain members among the Company's employees (R. 86; 17–18), the Company's supervisors (R. 88; 106) attempted to forestall the threat to the Association's status and to discourage the employees from affiliating with the I. A. M. Thus, one employee, who admitted her I. A. M. membership in response to the questioning of a supervisor, was warned by him to "stay the hell away from his girls" on penalty of discharge (R. 88–89; 186–187, 195–197). Another employee, who disclosed his I. A. M. affiliation to a group chief, was told by the chief that the employees "would lose their sick disability, holiday pay," and other benefits if an "outside union" came into the plant (R. 87–88; 176–177, 178). Supervisory employees also defended the Association's bargaining power to employees, described "outside" labor unions as "dishonest" organizations, unable to obtain employment for their members when

"working conditions are bad," and labeled the joining of an "outside" union as "the greatest crime a man can commit" (R. 88–89; 156–157, 172–173, 192–193). And I. A. M. members were denied privileges in the conduct of I. A. M. business during working hours which Association members were permitted to exercise in the conduct of Association business (*supra*, pp. 7–8) (R. 87, 94; 188–189).

The Board concluded (R. 90–95, 96, 97) that the Company had dominated, interfered with, and supported the Association, in violation of Section 8 (2) of the Act, that it had engaged in interference, restraint, and coercion, in violation of Section 8 (1), and that these unlawful practices and their effects were continuing. It ordered the Company to cease and desist from the unfair labor practices, to withdraw recognition from and disestablish the Association as collective bargaining representative of its employees, and to post the usual notices (R. 96, 97–99).

Thereafter, the Company and the Association filed separate petitions in the court below to review and set aside the Board's order (R. 308–316, 350–356). The Board answered, requesting enforcement of its order against the Company (R. 317–321, 356–358). On January 3, 1945, the court handed down its opinion (R. 323–332) and entered its decree (R. 347) enforcing the Board's order in full. Judge Soper dissented (R. 332–346, 347).

ARGUMENT

1. Petitioners have presented the case as if the validity of the Board's ultimate findings as to the unfair labor practices were to be determined by an examination of each of their underlying elements separately and in isolation. By this approach and by relying upon certain erroneous assumptions which are at variance with well supported findings of the Board, upheld by the court below, they have sought to represent the case as presenting novel, undecided questions, and as conflicting with the decisions of this Court and of other circuit courts of appeals. Petitioners' arguments are fallacious, however, because they rest on fundamental misconstructions of the record and because it is well settled that in determining the validity of Board findings the entire congeries of relevant facts must be considered, "not in isolation but as part of a pattern of events." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539.[3] When the case is properly viewed, the decision of the court below is clearly correct, as the evidence summarized in the Statement (*supra*, pp. 3–9) shows. Moreover, the alleged conflicts between it and the cases cited by petitioners are revealed as present-

[3] See also *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588; *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 57–58; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79.

ing merely factual differences which do not affect the basic principles of the decision.

2. Petitioners contend (Co. Pet. 4, 5, 7, 14–18; Ass'n Pet. 4, 6, 10–11) that the court below erroneously sustained the order of the Board "on grounds not relied on by the Board, including facts not even found by the Board to have occurred" (Co. Pet. 14). A reading of the entire opinion of the court below shows, however, that in approving the Board's findings as to the unfair labor practices, the court in fact relied almost entirely upon the same elements and applied the same principles as did the Board. While the court adverted in the course of its opinion to three minor items of evidence supporting the Board's findings (R. 326–327, 330), which the Board failed to mention in its decision,[4] this was

[4] These items were the testimony of employee Mileski—whose testimony in other respects the Board found to be credible (R. 86, 88)—respecting a conversation with Plan representative Myers (incorrectly referred to in the court's opinion as Plan representative Schmidt), at about the time the Association was being formed in 1937 (R. 326; see R. 154–155); Mileski's further testimony respecting a conversation with supervisor Leichsenring in 1939 (R. 330; see R. 156–157); and the testimony of employee Ohrin to the effect that employees were signed up by the Association on company time with the knowledge of supervisor Mercer (R. 330; see R. 174–175). The Company also complains (Co. Pet. 15–16) that the court referred in its opinion to "(5) An obvious belief by the employees that the Company desired an independent, rather than an outside, union"; and "(6) Swift grant to the Association by the Company of a check-off of dues, wage increases and other favors" (R. 331). The Company asserts

not error. Evidence which the Board has not recited in its decision is not necessarily excluded from consideration upon judicial review of its findings. *Stewart Die Casting Corp.* v. *National Labor Relations Board,* 114 F. (2d) 849, 854 (C. C. A. 7), certiorari denied, 312 U. S. 680; *North Carolina Finishing Co.* v. *National Labor Relations Board,* 133 F. (2d) 714, 717 (C. C. A. 4), certiorari denied, 320 U. S. 738.[5]

Moreover, whether or not the language of the opinion is wholly acceptable, the court's decision

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that the Board made no statement anywhere in its decision as to the employees' beliefs respecting its preferences among unions, and that, although the Board referred to the check-off and wage increases, they "are not relied upon by the Board as significant matters * * *" (Co. Pet. 15). Neither assertion accurately reflects the Board's findings. The Board expressly found (R. 95) that the Association "stands in the same position as the Plan," which the Company had fostered, dominated, and supported, and that the employees had never been effectively released from the restraints upon their freedom of organization which its maintenance of the Plan had engendered (R. 94). And the Board found (R. 83–84) that the Company granted the check-off of dues and the wage increases after the Association's representatives warned that if the concessions were not granted the organization might "disband and fall in hands of other labor organizations," that the employees would "attempt to secure more wages through other organizations," and that they "wouldn't want this kind of organization without 10 percent increase."

[5] In *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, this Court, in sustaining the Board's finding that the schedule of the "S. S. Fairland" had been altered by the company with knowledge that the crew had

is correct, for the Board's findings are clearly adequate to support its conclusions as to the unfair labor practices,[6] and, as has been stated, these findings are amply supported by substantial evidence. A correct decision will not be disturbed merely because "the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U. S. 238, 245; cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 195–197.

3. Petitioners also assert (Co. Pet. 19, see also 5, 7–8, 18–23; Ass'n Pet. 6, 11) that "the Board has declined to commit itself on the crucial question of present actual domination or independence" of the Association and that the Board's decision is in conflict in this respect with the decision of this Court in the *Southern Bell Telephone* case

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shifted their union affiliation, stated that "The 'Fairland' is equipped with radio" (at p. 221). This fact had not been mentioned in the Board's decision, but it was plainly relevant to the question whether the Board's finding of knowledge had the requisite evidentiary support. Such instances are of frequent occurrence under the Act. See, e. g., *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584.

[6] Accordingly, there is no conflict, as petitioners contend (Co. Pet. 7, 16–17; Ass'n Pet. 10–11), with *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Florida* v. *United States*, 282 U. S. 194; *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; and "other decisions of this Court" (Co. Pet. 16).

(319 U. S. 50).[7] But the Board expressly found that the Company's acts of domination and interference with the formation and administration of the Association "render the Association incapable of serving the * * * employees as a genuine collective bargaining representative and render its continued recognition * * * an obstacle to collective bargaining through freely chosen representatives" (R. 96); and that the Company was still dominating and interfering with the administration of the organization (R. 95). These findings are, if anything, more complete than were those made by the Board in the *Southern Bell* case.[8] In that case this Court stated (319 U. S.

[7] Petitioners' further assertions (Co. Pet. 3–4, 7–8, 18–23; Ass'n Pet. 4, 6, 11) that the Board failed in its decision to "review and appraise" their "very substantial evidence," including a report of a panel of the National War Labor Board and evidence of benefits obtained for the employees, that the Association is aggressive and militant, is incorrect. The Board's decision contains a full discussion of the Association's bargaining activities, including proceedings before the War Labor Board (R. 84–85, and note 23). It is well settled that the Board was not required to give such evidence conclusive weight on the issue of domination. See the *Southern Bell Telephone* case; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 544; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 600.

[8] In the *Southern Bell* case the Board found only that the employer's continued recognition of the organization constituted an obstacle to free collective bargaining (35 N. L. R. B. 621, 640). In that case this Court accepted the Board's view that this finding expressed the Board's judgment that, despite the passage of time and changes, the policies of the Act would be effectuated only by disestablishment.

50, 60) that "the question of the weight to be given the passage of time or subsequent efforts to dissipate the effect of this early domination is for the Board." The court below applied the same principle in this case (R. 331).

4. Contrary to petitioners' further contentions (Co. Pet. 5, 8–9, 23–29; Ass'n Pet. 5, 6–7), the instant case does not involve a holding by the Board and the court below that a "formal mechanical pattern" of notice to the employees of dissolution of the Plan was necessary in order to reestablish their freedom to organize for collective bargaining. The Board's decision discloses on its face that its conclusion (R. 94) that "the employees * * * were not freed from the [Company's] domination of the Plan, and that their acceptance of the Association * * * was not their free and voluntary Act" rests, not upon any ritualistic requirements, but upon the equivocal nature of the Company's notice of disestablishment of the Plan and the whole series of events surrounding the formation of the successor organization (R. 90–94). Likewise, the court below held (R. 326) that "No particular form of notice is required under the Act * * *," but based its concurrence with the Board's conclusions upon the "whole congeries of facts," among which the "equivocal second-hand announcement as to the dissolution of the Plan" was one (R. 326, 331). Accordingly, there is no conflict in principle with

National Labor Relations Board v. *Duncan Foundry & Machine Works, Inc.*, 142 F. (2d) 594 (C. C. A. 7); that case turned, as does the instant case, upon its own particular facts. Cf. *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming (*per curiam*) 112 F. (2d) 657 (C. C. A. 2).

5. Petitioners' further contentions (Co. Pet. 3, 6, 9, 10, 29–30, 31–32; Ass'n Pet. 4, 5–6, 7–10) that the Company "did not participate [in] or advise or assist" (Co. Pet. 30) the activities of the employees in organizing the Association and that the Board, in reaching its conclusion as to domination and interference with the Association, therefore improperly relied upon the actions of the employee representatives under the Plan, and upon the Company's recognition of the committee comprising these representatives, selected by the majority of the employees as an interim labor organization, are likewise without merit. They disregard the Board's well supported findings (R. 91, 93–94), concurred in by the court below (R. 329), that the employees were never freed from the coercive effects of the Company's prior domination of the Plan and that, in the language of the court below (*ibid.*), "these Plan representatives were unable to emancipate themselves from the domination of the Company so as to represent the employees fairly. Cf., *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461."

See also the *Westinghouse* case, *supra*. Petitioners' claims of conflicts in respect to these features of the case with the decisions of other circuit courts of appeals (Co. Pet. 9, 10, 30, 31; Ass'n Pet. 8–10), are thus unfounded. See, also, pp. 15–16, *supra*.

6. Finally, petitioners say (Co. Pet. 4, 6, 10–11, 32–35; Ass'n Pet. 6, 10) that the Board, in reaching its conclusions as to the unfair labor practices, improperly relied upon allegedly minor and isolated incidents of support of the Association by several supervisory employees. These included activities of supervisors in questioning employees as to their membership in the I. A. M., and statements by them lauding the Association, disparaging "outside" unions, and warning employees not to join such unions on pain of losing sick disability, holiday pay, and other benefits (R. 87–90, 94). These incidents were correctly regarded by the Board as "part of the circumstances from which the Board is to draw conclusions." The *Southern Bell* case, 319 U. S. at 57–58. They are not protected by the First Amendment merely because they involve "pressure exerted vocally." The *Virginia Electric & Power Co.* case, 314 U. S. at p. 477. Cf. *Thomas* v. *Collins,* No. 14, this Term, decided January 8, 1945. Nor was it necessary for the Board to show that the pressure bore fruit. *National Labor Re-*

lations Board v. *Link-Belt Co.*, 311 U. S. 584, 588.[9] The cases cited by the Company (Co. Pet. 33–34) are not in conflict with these principles.

CONCLUSION

The decree of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petitions for writs of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1945.

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[9] The Company also objects to the Board's findings as to these incidents on the ground that the trial examiner rejected them (R. 59) and the I. A. M. filed no exceptions to the examiner's finding (Co. Pet. 32–33). But it is the Board, not the examiner, that is charged under the Act with making the findings. Section 10 (c). And the Board's Rules and Regulations provide (Article II, Section 33) that the "failure to file a statement of exceptions [to the Intermediate Report of the Trial Examiner] shall operate as a submission of the case to the Board on the record."

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> * * * * *
>
> SEC. 10. * * *
>
> * * * * *
>
> (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *
>
> (f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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Supreme Court of the United States

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No. 984.

WESTERN ELECTRIC COMPANY, INCORPORATED,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION OF WESTERN ELECTRIC COMPANY, INCORPORATED, FOR A WRIT OF CERTIORARI.

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